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No. 88-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PAUL ADAMS, et al.,

Petitioners,

vs.

AVCO CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS, AVCO CORPORATION, ET AL., IN OPPOSITION

DON A. BANTA
NAPHIN, BANTA & COX
55 West Monroe Street
Suite 2800
Chicago, Illinois 60603
(312) 236-0177

Attorney for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

In view of the independent judicial interpretations of the relevant plans below, as well as the delegated discretionary authority of the pension plan administrator, is it necessary to remand this case to afford a *Firestone de novo* review of the petitioners' eligibility for severance pay and a subsidized 85% pension?

LIST OF PARTIES

Respondents accept petitioners' listing of the parties, but note in addition that Avco Corporation is a subsidiary of Textron Inc., a Delaware corporation.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CASES AND AUTHORITIES CITED	iv
STATEMENT OF THE CASE	1
ARGUMENT	3
I. REMAND OF THIS CASE IS UNWARRANTED SINCE *DE NOVO* JUDICIAL REVIEW OF BOTH THE SEVERANCE AND PENSION PLAN ISSUES HAS ALREADY BEEN ACCOMPLISHED BELOW IN AVCO'S FAVOR	3
II. AVCO'S PENSION PLAN GIVES THE ADMINISTRATOR UNLIMITED DISCRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS AND TO CONSTRUE THE TERMS OF THE PLAN, OBVIATING THE NEED FOR *DE NOVO* REVIEW OF THE DENIAL OF BENEFITS TO PETITIONERS	5
CONCLUSION	6
APPENDIX—Avco Retirement Plan, Article Fourteen	1a

TABLE OF CASES AND AUTHORITIES CITED

Cases	PAGE
Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985)	4
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. ___, 109 S.Ct. 948 (1989)	4, 5, 6

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STATEMENT OF THE CASE

Respondents adopt the statement of the case set forth by the Court of Appeals below in part I of its opinion, reproduced in the petition for a writ of certiorari, pages 2a-3a, as follows:

> "In July of 1984, plaintiffs/cross-appellees, seventeen ex-employees of Avco Corporation ("Avco") were terminated from their employment when Avco sold one of its divisions ("Division") to Allied Products Corporation ("Allied"). When Avco sold the Division, all

but one of the terminated employees were subsequently employed by Allied. Pursuant to Avco's Severance Pay Plan, the employee who was not hired by Allied received severance pay from Avco; however, none of the other terminated employees received severance benefits. After the employees complained that they also were entitled to severance pay under the Plan, Avco responded that the severance pay provisions applied only to workers who suffered a period of unemployment. The employees argued, however, that since the Plan provisions did not contain the word 'unemployment', unemployment was not a prerequisite for receiving severance benefits.

When Avco sold the Division to Allied, Avco's Retirement Plan provided for normal retirement at age 65 and for early retirement between the ages of 55 and 65 for employees who had 10 years of service with Avco. While none of the employees were eligible for early retirement when they worked for Avco, several of them became eligible and elected to receive early retirement benefits after they began working for Allied. Avco contends that if the employees had still been employed by Avco, they would have been eligible for an 85% early retirement benefit. However, since they no longer worked for Avco, Avco determined that they were entitled to only an actuarially equivalent retirement pension which was reduced by 50%.

The plaintiffs-appellants filed an action against Avco and its Severance Pay and Retirement Plans ("Plans") in the United States District Court for the Northern District of Ohio. The employees presented eleven claims in their complaint which essentially alleged that Avco breached certain provisions of the Plans by denying them severance pay and retirement benefits."

The District Court held on the severance pay issue that the wording of the applicable Avco severance pay policy should be interpreted to mean it was inapplicable to em-

ployees who were immediately re-employed by a successor corporation. Having adopted this construction of the policy, the District Court went on to conclude that Avco's denial of severance pay to the petitioners who were hired by Allied was not arbitrary, capricious or in bad faith. The Court of Appeals affirmed this ruling of the District Court.

On the pension issue, the District Court likewise formed its own construction of the plan instrument, which led it to believe that Avco's application of the actuarially reduced pension benefit to petitioners was "arbitrary and capricious". The Court of Appeals then undertook a second review of the meaning of the Avco pension plan document, and held that the petitioners were entitled to an actuarially equivalent pension reduced by 50% rather than an 85% early retirement pension, reversing the interpretation of the District Court.

ARGUMENT

I.

REMAND OF THIS CASE IS UNWARRANTED SINCE *DE NOVO* JUDICIAL REVIEW OF BOTH THE SEVERANCE AND PENSION PLAN ISSUES HAS ALREADY BEEN ACCOMPLISHED BELOW IN AVCO'S FAVOR.

The District Judge had this to say about Avco's severance pay policy:

> "In the case sub judice, the Court focuses on the wording of the subparagraph entitled 'Purpose' upon which plaintiffs base the essence of their argument. As it says in the first sentence of this paragraph, 'The purpose of this policy is to provide a measure

> of economic protection for employees who are involuntarily terminated. . . .' (Emphasis added). The Court finds that the wording 'measure of economic protection' would be improperly construed if used in reference to employees who were immediately re-employed by a successor corporation. An employee who is immediately rehired by a successor corporation has no need for any measure of economic protection." [petition, p. 10a]

Having reached this independent, *de novo* rendering of the wording of Avco's severance pay instrument, the District Judge proceeded to measure it against the "guidelines as laid out by the Sixth Circuit" in *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985) (petition, p. 11a). Needless to say, the District Judge's finding that Avco's reading of the plan was the correct reading constrained the legal conclusion that the Avco reading could never be viewed as violating the "arbitrary and capricious" test. Since the District Judge has already laid down his independent interpretation of the severance policy, there is no reason whatever to vacate the judgment of the Sixth Circuit and remand this case with instructions for a further remand to the District Court for consideration in light of *de novo* review standards enunciated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. ____, 109 S.Ct. 948 (February 21, 1989).

On the pension issue, the Court of Appeals similarly made its own independent, *de novo* analysis of the meaning of Avco's pension plan. In reversing the District Judge's interpretation of Avco's plan provisions detailing the eligibility of vested persons who had not reached early retirement age at the time of termination of employment, the Court of Appeals said this:

> "We hold that the employees were entitled to an actuarially equivalent pension reduced by 50% as pro-

> vided by ¶ 11.5 of the Plan rather than an 85% early retirement pension as provided by ¶ 6.2 of the Plan." [petition, p. 4a]

This is a clear, unambiguous and explicit *de novo* interpretation of the Avco plan. As in the case of the severance pay count, there is no necessity for a remand to the District Court below, as sought by petitioners, in order to achieve something which has already been accomplished.

II.

AVCO'S PENSION PLAN GIVES THE ADMINISTRATOR UNLIMITED DISCRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS AND TO CONSTRUE THE TERMS OF THE PLAN, OBVIATING THE NEED FOR *DE NOVO* REVIEW OF THE DENIAL OF BENEFITS TO PETITIONERS.

In the *Firestone* case, this Court held that a denial of benefits need not be reviewed under a *de novo* standard where the plan "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 109 S.Ct. at p. 956. Avco's pension plan instrument endows its administrator with exactly that sort of authority.

The Avco retirement plan was appended to the second amended complaint below as Exhibit D, and the provisions of Article Fourteen, Sections 14.1 and 14.2, of the plan are reproduced in the Appendix of this Brief. Section 14.2 explicitly endows the administrative Committee with "the power to interpret and construe the plan, to determine all questions of eligibility and of the status and rights of Participants and others and, in general, to decide any disputes arising hereunder." This section goes on to reinforce its reservation of discretion by mandating that the determination of the administrator "on all matters of

administration shall be conclusive and binding on all persons." Unlike the plan in *Firestone*, where there was "no evidence . . . the administrator has the power to construe uncertain terms or that eligibility determinations are to be given deference", it is difficult to imagine how the Avco administrator's discretion could be more forcefully and more powerfully articulated. 109 S.Ct. at p. 954. Accordingly, in addition to the *de novo* interpretation of the pension plan adopted by the Court of Appeals, the reservation of administrative discretion incorporated in the Avco retirement plan provides a further and equally compelling reason to decline the invitation of petitioners to remand this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DON A. BANTA
NAPHIN, BANTA & COX
Xerox Centre, Suite 2800
55 West Monroe Street
Chicago, Illinois 60603
(312) 236-0177

Attorney for Respondents

APPENDIX

ARTICLE FOURTEEN

ADMINISTRATION

14.1 **Committee**—The general administration of the Plan and the responsibility for carrying out the provisions thereof shall be placed in the Committee and said Committee shall act as the named fiduciary. Committee members, including a chairman, shall be appointed by the Board or the Executive Committee and the Plan's Committee members shall at no time be less than three in number. Any vacancy in the Committee shall be filled by the Board or the Executive Committee. A member may resign by written notice to the Board or Executive Committee and such resignation shall become effective at delivery or on any later date specified therein. The members of the Committee shall appoint a secretary who may be, but need not be, a member of the Committee.

14.2 **Powers**—The Committee shall have complete control of the administration of the Plan with all powers necessary to enable it properly to carry out its duties in that respect. Without limiting the generality of the foregoing, the Committee shall have the power to interpret and construe the Plan, to determine all questions of eligibility and of the status and rights of Participants and others and, in general, to decide any disputes arising hereunder. Its determination on all matters of administration shall be conclusive and binding on all persons. The Committee shall compute and certify to the Trustee or Insurance Company the amount and manner of payment of benefits to which Pensioners, Eligible Spouses, Co-Pensioners or Beneficiaries become en-

titled. All disbursements by the Trustee or Insurance Company, except for the ordinary expenses of administration of such Trust or Insurance Contract, shall be made only upon the written instructions of the Committee. The Committee may appoint agents and delegate to such agents all or part of their powers and fiduciary responsibilities under this Plan. The compensation, if any, of such agents shall be fixed by the Committee within the limits set by the Company. The Committee may employ counsel and engage such clerical, financial or other services as it may deem necessary or appropriate.

14.3 **Expenses**—All expenses of the Committee shall be paid by the Company. No member of the Committee shall be entitled to any compensation by virtue of his service as such or be required to give any bond or other security except as required by law.

14.4 **Standard of Care**—The members of the Committee shall discharge their duties with respect to the Plan solely in the interests of the Participants and their beneficiaries with the purpose of providing benefits and defraying reasonable expenses of administering the Plan, with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and in accordance with the provisions of the Plan insofar as such text is consistent with the provisions of ERISA.

14.5 **Management of Assets**—The Board or the Executive Committee shall have the sole responsibility for the selection of the Trustees and Insurance Company and investment manager. The Trustee and Insurance Company and investment manager shall have responsibility for the management and control of the assets of the funds within their care, as the Board or Executive Committee shall determine.

14.6 **Funding Policy**—The Board or Executive Committee shall establish a funding policy and method with respect to funding the Plan which satisfies the requirements of Section 402(b) of ERISA.

14.7 **Indemnity**—The Participating Companies shall indemnify and save harmless members of the Committee and any other officers or Employees who are involved in the administration of the Plan from the effects and consequences of their acts, omissions and conduct in their formal capacity to the extent permitted by law. No part of the Fund shall be used for indemnification payments.

14.8 **Claims Procedure**—A Participant, Eligible Spouse, Co-Pensioner or Beneficiary must make an application for benefits, in writing, to the party or parties designated by the Committee, within ninety (90) days prior to the date on which payments of his benefit is to commence. If such application for benefits is denied in whole or in part, the Committee shall notify the claimant within thirty (30) days in writing in non-technical language of (i) the reason for the denial; (ii) the pertinent Paragraph or Paragraphs of the Plan upon which the denial is based; (iii) any additional material or information necessary to perfect the claim and reasons why such information is necessary; and (iv) an explanation of the Plan's review procedure.

14.9 **Review Procedure**—Within sixty (60) days after receipt of the written notification denying a claim made pursuant to Paragraph 14.8, any individual affected thereby may request that the claim denial be reconsidered. Such claimant shall state in writing, delivered to the Committee, the reasons why the denial is erroneous. The claimant shall have the opportunity to review any pertinent documents that he may request. If he so requests, the Committee shall grant him a hearing; or if he does not request a hearing, the Committee shall reach a determination based on his written appeal. He may appear

before and present his views to the Committee, in person or by his duly authorized representative, at a meeting at which at least a majority of the members of the Committee are present.

The Committee shall make a decision not later than sixty (60) days after the filing of the notification of appeal. The Committee's decision shall be stated in writing, with its reasons therefore, including specific references to the pertinent Plan provision upon which the decision is based. Such decision shall be final and binding on all parties unless the Committee on its motion agrees to reconsider such claim. Copies of such decision shall be made available to the claimant.

14.10 **Use of Actuary**—The Committee shall employ or engage an Actuary to make actuarial valuations of the liabilities under this Plan, and other calculations for any purposes of this Plan, to make recommendations as to the amounts of contributions to be made and to perform such other services deemed necessary or advisable in connection with the administration of the Plan.